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Nos. 94-1933 and 94-9078

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

TADEUSZ SOBIECKI, PETITIONER

v.

UNITED STATES OF AMERICA

EWA BROZEK-LUKASZUK AND LESTER LUKASZUK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any error in the jury instructions on the elements of a violation of 8 U.S.C. 1324(a)(1)(B) was harmless.

2. Whether the indictment adequately charged petitioner Sobiecki with a violation of 8 U.S.C. 1324(a)(1)(B).

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OPINION BELOW

The opinion of the court of appeals (94-9078 Pet. App. 1(1)-1(16); 94-1933 Pet. App. D1-D33) is reported at 42 F.3d 387.[1]

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[1] The appendix to the petition in No. 94-1933 consists of four separately paginated items, which we have assigned the letters A through D. When citing the court of appeals' opinion hereafter, we refer exclusively to the appendix in No. 94-9078.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1994. 94-1933 Pet. App. A. A petition for rehearing was denied on January 27, 1995. 94-9078 Pet. App. 2(1)-2(2); 94-1933 Pet. App. B1-B2. The petitions for a writ of certiorari were filed on April 27, 1995. Although petitioner in No. 94-1933 cites 28 U.S.C. 2101 as the basis for this Court's jurisdiction, the Court's jurisdiction is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on multiple counts of transporting illegal aliens within the United States, in violation of 8 U.S.C. 1324(a)(1)(B), and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Sobiecki was sentenced to 36 months' imprisonment, to be followed by three years' supervised release, and fined $50,000. 94-1933 Pet. App. C2-C4. Petitioner Brozek-Lukaszuk was sentenced to six months' imprisonment, to be followed by three years' supervised release, and fined $5,000. Brozek-Lukaszuk C.A. Br. App. 1(2)-1(3). Petitioner Lukaszuk was sentenced to 36 months' probation, to be followed by three years' supervised release, and fined $5,000. Lukaszuk C.A. Br. App. 2(2)-2(3). The court of appeals affirmed. 94-9078 Pet. App. 1(1)-1(16).

1. Eight times between February 12 and April 21, 1991, petitioners' co-defendant Allan Parmelee, a pilot, flew illegal Polish immigrants from Grimsby Airpark near Toronto, Canada, to DuPage County

Airport in West Chicago, Illinois.[2] Each time, the illegal aliens were carrying luggage and the flight took place late at night. From DuPage County Airport, Parmelee drove the illegal aliens to prearranged locations in Chicago, where they were met by petitioner Sobiecki. 94-9078 Pet. App. 1(2)-1(3). Sobiecki drove them to their final destinations in Chicago or to other locations where they were met by petitioners Brozek-Lukaszuk and her husband, Lester Lukaszuk, among others, for further transportation. *Id.* at 1(3). Petitioners were charged with substantive violations of 8 U.S.C. 1324(a)(1)(B) and a conspiracy to violate that statute.[3]

2. At trial, the district court quoted the text of 8 U.S.C. 1324(a)(1)(B), and instructed the jury that, to find petitioners guilty of that offense, it had to find the following elements beyond a reasonable doubt:

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[2] Parmelee pleaded guilty during trial to all 17 counts of the indictment. He was sentenced to 21 months' imprisonment. 94-9078 Pet. App. 1(3). The court of appeals vacated his sentence and remanded for resentencing. *Id.* at 1(9).

[3] Section 1324(a) prescribes a fine or imprisonment, or both, for:

> (1) Any person who—
>
> * * * * *
>
> (B) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law[.]

> First, that the alien had entered or remained in the United States in violation of law;
>
> Second, that the defendant knew or recklessly disregarded the fact that the alien had entered or remained in the United States in violation of law; and
>
> Third, that the defendant transported the alien in furtherance of the alien's unlawful entry to or presence in the United States.

94-9078 Pet. App. 1(4). The court elaborated upon the third element as follows:

> In order for transportation to be in furtherance of an alien's unlawful entry or presence, there must be a direct or substantial relationship between the defendant's act of transportation and the alien's unlawful entry to or presence in the United States. In other words, the act of transportation must not be merely in[cid]ental to a furtherance of the alien's violation of the law.
>
> An act of transportation is in furtherance of the alien's unlawful entry [or] presence if such transportation brings the alien to his or her destination or place of refuge, or helps the alien remain in the country unlawfully, undetected by those responsible for enforcing the immigration laws.
>
> A surreptitious or furtive transportation of an alien which inhibits the enforcement of immigration laws may be in furtherance of the alien's unlawful entry [or] presence.

Ibid. Petitioners objected to these instructions on the ground that they allowed the jury to find them guilty even if they did not know they were furthering the aliens' violation of law. *Ibid.*

3. The court of appeals affirmed petitioners' convictions. 94-9078 Pet. App. 1(1)-1(16).[4] Initially, the court accepted petitioners' contention that, to establish a violation of Section 1324(a)(1)(B), the government had to prove "not only that the defendant knew the alien he transported had entered this country in violation of immigration law, but also that the defendant knowingly transported the alien to further that violation." 94-9078 Pet. App. 1(4); see also *id.* at 1(5) ("[W]e hold that a defendant's guilty knowledge that his transportation activity furthers an alien's illegal presence in the United States is an essential element of the crime stated in section 1324(a)(1)(B)."). The court further held that "the instructions as a whole did not clearly place this element before the jury." 94-9078 Pet. App. 1(5).

The court of appeals also held, however, that the instructional error was harmless beyond a reasonable doubt. Relying on Justice Scalia's concurring opinion in *Carella* v. *California*, 491 U.S. 263, 271 (1989), and on *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993), the court stated that "the instructional error here is harmless if, given the facts of this case, no rational jury could have found [petitioners] guilty of violating section 1324(a)(1)(B) without also making the proper factual finding as to the missing element of willfulness." 94-9078 Pet. App. 1(7). Applying that test, the court determined that, "under the factual circumstances of this case, * * * a rational jury, which found that [petitioners] knew the aliens were illegal, also would have necessarily found that

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[4] In a ruling that is not at issue here, the court of appeals also vacated Parmelee's sentence and remanded the case for resentencing. 94-9078 Pet. App. 1(3), 1(9).

[petitioners] knew their activity furthered the aliens' violation of the law." *Ibid.* The court based that determination on "the unrebutted evidence that [petitioners] furtively transported the aliens late at night; drove evasively to elude police surveillance, at times at high rates of speed; and received compensation by the carload for the delivery of luggage-laden and foreign-speaking aliens who were strangers to [petitioners]." *Ibid.*

ARGUMENT

1. Petitioners contend (94-1933 Pet. 4-24; 94-9078 Pet. 7-12) that the court of appeals erred in holding that the trial court's failure to instruct the jury on one of the elements of a violation of 8 U.S.C. 1324(a)(1)(B) was harmless. They argue that a failure to instruct the jury on an element of an offense can never be harmless error. They also claim that the circuits are in conflict over whether such instructional errors are subject to harmless-error analysis. 94-1933 Pet. 3-4; 94-9078 Pet. 11-12.

a. We agree with the court of appeals' holding that, in a prosecution under 8 U.S.C. 1324(a)(1)(B), the government must prove that "the defendant knowingly transported the alien to further that violation." 94-9078 Pet. App. 1(4). Every court of appeals to consider the issue has so held.[5] We disagree,

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[5] See *United States* v. *Chavez-Palacios*, 30 F.3d 1290, 1294 (10th Cir. 1994); *United States* v. *Diaz*, 936 F.2d 786, 788 (5th Cir. 1991); *United States* v. *Velasquez-Cruz*, 929 F.2d 420, 422 (8th Cir. 1991); *United States* v. *Medina-Garcia*, 918 F.2d 4, 7-8 (1st Cir. 1990); *United States* v. *1982 Ford Pick-Up*, 873 F.2d 947, 950-951 (6th Cir. 1989); *United States* v. *Moreno*, 561 F.2d 1321, 1322 (9th Cir. 1977).

however, with the court of appeals' conclusion that the jury instructions did not require the jury to find that knowledge. Taken as a whole, the instructions placed that issue before the jury.

The jury was instructed that the government had to prove that petitioners "transported the alien in furtherance of the alien's unlawful entry." 94-9078 Pet. App. 1(4). That instruction included the statutory language, "in furtherance of," that the courts of appeals have uniformly interpreted to require proof that the defendant knew his transportation assisted the alien's illegal action. See, *e.g.*, *United States* v. *1982 Ford Pick-Up*, 873 F.2d 947, 950-951 (6th Cir. 1989). That connotation was specifically suggested by the instruction's later explanation that the "in furtherance of" requirement may be satisfied by "[a] surreptitious or furtive transportation" that eludes immigration officials—conduct that implies a knowingly improper purpose on the defendant's part.

The jury was also instructed that, "[i]n order for transportation to be in furtherance of an alien's unlawful entry or presence, there must be a direct or substantial relationship," as opposed to an "in-[cid]ental" one, "between the defendant's act of transportation and the alien's unlawful entry * * * or presence." 94-9078 Pet. App. 1(4). But the instruction did not state or imply that such a "direct or substantial" connection is sufficient to satisfy the element. Nor did the following instruction so state or imply. It merely gave the jury two examples of a sufficiently "direct or substantial" connection: acts of transportation that "bring[] the alien to his or her destination or place of refuge, or [that] help[] the alien remain in the country unlawfully, unde-

tected by those responsible for enforcing the immigration laws." *Ibid.* In sum, while the court's listing of the elements did not expressly refer to petitioners' knowledge that their transportation was in furtherance of the alien's unlawful entry or presence, the court's elaboration of the concept of "in furtherance of" required a finding of such knowledge.

b. Even if the jury instructions did not place the knowledge element before the jury, the court of appeals correctly held that that instructional error was subject to harmless-error analysis and was harmless in this case.

i. This Court has made clear that instructional error, like other trial errors, is subject to harmless-error analysis. In *Rose* v. *Clark*, 478 U.S. 570 (1986), the Court held that harmless-error analysis was applicable to a jury instruction that, in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), allowed the jury to presume the element of malice in a murder prosecution "in the absence of evidence which would rebut the implied presumption." *Rose* v. *Clark*, 478 U.S. at 574. In *Pope* v. *Illinois*, 481 U.S. 497 (1987), the Court held that a jury instruction misdefining an essential element of the crime was subject to harmless-error analysis. See *id.* at 500-501 (jury was erroneously instructed to determine whether allegedly obscene material had "value" under a community standard, rather than a reasonable person standard). In *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), the Court invalidated an instruction requiring the jury, if it found certain facts, conclusively to presume that the defendant had the "[i]ntent to commit theft by fraud" or "embezzled" a vehicle, but the Court remanded the case

for the state courts to determine whether the error was harmless. *Id.* at 264, 267.

The Court in *Carella* indicated that the instructional error involved there would be harmless if "no rational jury could find the predicate acts but fail to find the fact presumed." 491 U.S. at 267. The Court explained that, "[i]n many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury." *Id.* at 266 (quoting *Rose* v. *Clark*, 478 U.S. at 580-581); see also *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2082 (1993). The concurring opinion in *Carella* also explained that, when the factual findings required to trigger a presumption "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment). In later decisions, the Court has emphasized that, once a court determines that an instructional error is subject to harmless-error analysis, the court must analyze the effect of the error by reference to the jury's actual verdict under the instructions given. *Sullivan*, 113 S. Ct. at 2081-2082; *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991).

The instructional error that the court of appeals found in this case was similar to that involved in *Carella*. In each case, the court determined that the instruction failed to require the jury to find an essential element of the crime. See *Carella*, 491 U.S. at 266 (instruction directing jury to apply conclusive presumption "relieved the State of its burden of

* * * proving by evidence every essential element of Carella's crime beyond a reasonable doubt"). Accordingly, the court of appeals in this case properly undertook an analysis similar to that described in *Carella*. It considered whether, under the instructions that were actually given and the evidence presented, a rational jury that found the facts that the jury in this case must have found in returning a guilty verdict could have failed to find that petitioners acted with the requisite knowledge. 94-9078 Pet. App. 1(7).

Contrary to petitioners' contention (94-9078 Pet. 10-11; 94-1933 Pet. 6-8), the court of appeals' approach is consistent with *Sullivan* v. *Louisiana*, *supra*. The Court in *Sullivan* held that harmless-error analysis did not apply to a constitutionally deficient jury instruction on reasonable doubt. 113 S. Ct. at 2080-2083. The Court explained that such an error "vitiates *all* the jury's findings." *Id.* at 2082. The Court accordingly concluded that, because of the error, there were no valid jury findings to which a court could apply harmless-error analysis. That is not the case here. Any failure by the district court to instruct the jury on the knowledge element could not have affected the findings that the jury made under the instructions that were given. It therefore did not disable the court of appeals from conducting harmless-error analysis.

ii. Petitioner Sobiecki contends (94-1933 Pet. 17-24) that, even if the district court's failure to instruct the jury on the knowledge element was subject to harmless-error analysis, the failure was not harmless under the circumstances of this case. That fact-bound contention does not warrant further review.

In any event, the court of appeals correctly held that the error was harmless. As the court of appeals explained, the jury's guilty verdict reflected a finding that petitioners knew that the aliens that they had transported were present in or had entered the United States illegally. See 94-9078 Pet. App. 1(7). Underlying that finding was "unrebutted evidence that [petitioners] furtively transported the aliens late at night; drove evasively to elude police surveillance, at times at high rates of speed; and received compensation by the carload for the delivery of luggage-laden and foreign-speaking aliens who were strangers to [petitioners]." *Ibid.* In light of that evidence, the court of appeals correctly determined that no rational jury could have found that petitioners knew of the aliens' illegal presence in or entry into the United States without also finding that petitioners knew, as well, that their transportation of the aliens furthered the aliens' illegal acts. *Ibid.*[6]

c. Petitioners contend (94-9078 Pet. 11-12; 94-1933 Pet. 3-4) that there is a conflict in the courts of appeals on the question whether a failure to instruct the jury on an essential element of an offense is subject to harmless-error analysis. That contention does not warrant further review.

Petitioners base their claim of a conflict on Justice White's statement dissenting from the denial of certiorari in *Teel* v. *Tennessee*, 498 U.S. 1007 (1990).

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[6] Petitioners Brozek-Lukaszuk and Lukaszuk assert (94-9078 Pet. 10) that not all of the evidence cited by the court of appeals indicated knowledge on the part of each defendant. They do not contend, however, that any of the evidence was inapplicable to them. In any event, their fact-bound assertion, which is not supported by any argument or record citations, does not warrant further review.

Justice White cited decisions from the Second, Sixth, and District of Columbia Circuits that he described as holding that "error resulting from a failure to give proper instructions on the essential elements of an offense cannot be harmless." *Id.* at 1008. Later decisions in those circuits, however, indicate that none of them currently subscribes to that holding.[7] Moreover, since the denial of certiorari in *Teel*, this Court has made clear in *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), that "most constitutional errors can be harmless." *Id.* at 306. Furthermore, the Court in *Sullivan* and *Yates* has clarified the application of harmless-error analysis to instructional error.

The Ninth Circuit has stated in several decisions that the failure to instruct on an essential element can never be harmless error. See *United States* v. *Hove*, 52 F.3d 233, 235-236 (1995); *United States* v. *Stein*, 37 F.3d 1407, 1410 (1994); *United States* v.

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[7] See *Ianniello* v. *United States*, 10 F.3d 59, 64 (2d Cir. 1993) (harmless-error analysis applied to erroneous failure to instruct jury that government had to prove that predicate acts alleged in RICO charge were related); *United States* v. *North*, 910 F.2d 843, 892-893 (harmless-error analysis applied to erroneous instruction to jury that congressional inquiry was "pending" as a matter of law for purposes of determining whether defendant violated 18 U.S.C. 1505), opinion withdrawn and superseded in part on rehearing on other grounds, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991); see also *United States* v. *Dotson*, 895 F.2d 263, 264-265 (6th Cir.) (jury instruction quoting statute did not adequately explain one element of offense, but that error was subject to harmless-error analysis; prior Sixth Circuit decisions stating that such errors cannot be harmless "may not be long for this world" in light of later decisions of this Court), cert. denied, 498 U.S. 831 (1990).

Gaudin, 28 F.3d 943, 951 (1994) (en banc), aff'd on other grounds, No. 94-514 (June 19, 1995); see also *Harmon* v. *Marshall*, No. 94-55733 (9th Cir. June 9, 1995). Notwithstanding those statements, the Ninth Circuit's decision in *United States* v. *Whitmore*, 24 F.3d 32, 36 (1994) (per curiam), strongly suggests that the Ninth Circuit would have agreed with the Seventh Circuit's holding that the instructional error in this case was harmless.

Whitmore was charged with using a telephone to further a drug trafficking crime, in violation of 21 U.S.C. 843(b). 24 F.3d at 33. The Ninth Circuit held that the district court erred in failing to instruct the jury that the government was required to prove that Whitmore knowingly used the telephone to further the drug transaction. *Id.* at 35. The Ninth Circuit further held, however, that "the error was harmless beyond a reasonable doubt." *Ibid.* The court recognized that in a prior decision it had stated that, "when an element of the crime that must be found by the jury is removed from jury consideration, that error cannot be harmless." *Id.* at 36 (quoting *United States* v. *Gaudin*, 997 F.2d 1267, 1272 (1993), aff'd in part, rev'd in part and remanded, 28 F.3d 943 (9th Cir. 1994) (en banc), aff'd on other grounds, No. 94-514 (June 19, 1995)). The court determined, however, that under the circumstances of that case it was clear that the error did not affect the verdict (*Whitmore*, 24 F.3d at 36):

> Unlike *Gaudin*, * * * the district court did *not* "completely remove from the consideration of the jury" the issue of Whitmore's knowledge. The jury was properly instructed that Whitmore had to act knowingly in connection with the drug

> transaction that underlies the § 843(b) violation. The jury was also instructed that Whitmore had to use a telephone to bring about the conspiracy to distribute cocaine or to bring about the distribution of or the possession with the intent to distribute a controlled substance. In these circumstances, we can be certain that the evidence the jury actually considered in accordance with the instructions the district court actually gave is so overwhelming as to leave it beyond reasonable doubt that the jury would have convicted Whitmore on the § 843(b) counts even if the district court had given a knowledge instruction on those counts.

The issue in *Whitmore* closely parallels the issue in this case. In *Whitmore*, the district court failed to instruct the jury that the government was required to prove that the defendant knowingly used the telephone to bring about an illegal drug transaction; here (the court of appeals determined), the district court failed to instruct the jury that the government was required to prove that petitioners knowingly transported aliens in furtherance of their illegal entry or presence in the United States. In both cases, however, the district court gave the jury a knowledge instruction in connection with a closely related act: In *Whitmore*, the jury was required to find that Whitmore knew that a controlled substance was involved in the transaction that the use of the telephone facilitated; here, the jury was required to find that petitioners knew that the aliens that they transported were illegally in the country. Furthermore, in both cases, the jury was instructed to find that the defendant did the act (used the telephone; transported the aliens) "to help bring about" or "in

furtherance of" the act as to which they had knowledge.

Moreover, the Ninth Circuit's analysis in *Whitmore* paralleled that of the Seventh Circuit here. Both courts examined the evidence that the jury considered in making findings under the instructions that were actually given. Both courts concluded, in light of those findings, that no rational jury could have failed to find the element that, because of instructional error, it was not expressly instructed to find. It is therefore doubtful that the Ninth Circuit would have reached a different result on the facts of this case.

2. Petitioner Sobiecki contends (94-1933 Pet. 24-30) that the counts in the indictment charging him with violations of Section 1324(a)(1)(B) were deficient because they did not allege that he acted knowingly with respect to the "in furtherance of" element. That is incorrect. The counts based on Section 1324(a)(1)(B) adequately alleged the mental element by tracking the language of that provision, including the language that courts have construed to require proof of such knowledge. Thus, each such count charged that he transported aliens "who had not lawfully come to and entered the United States and were not lawfully entitled to remain in the United States, in furtherance of such aliens' violation of law, * * * knowing and acting in reckless disregard of the fact that such aliens had not lawfully come to and entered the United States and were not lawfully entitled to remain in the United States, [i]n violation of Title 8, United States Code, Section 1324(a)(1)(B)." As this Court has stated, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself." *Hamling*

v. *United States*, 418 U.S. 87, 117 (1974). Petitioner cites no case law to suggest that that principle is inapplicable here.[8] Moreover, he does not claim that he lacked notice of the offenses with which he was charged or that the indictment was insufficiently detailed to allow him to raise it as a double jeopardy bar in subsequent proceedings. See *ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1995

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[8] Petitioner's reliance (94-1933 Pet. 26) on *Stirone* v. *United States*, 361 U.S. 212, 215-218 (1960), is misplaced; it involved a variance between the indictment and the proof at trial that the Court found prejudicial. The lower court decisions cited by petitioner (94-1933 Pet. 26-27) merely hold that an indictment must allege the essential elements of the offense with which the defendant is charged.

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